Filed 9/29/14 P. v. Bowman CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

WENDY BOWMAN,

Defendant and Appellant.

G048874

(Super. Ct. No. 10NF3346)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, W. Michael Hayes, Judge. Affirmed.

Paul J. Katz, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette and Julie L. Garland, Assistant Attorneys General, Charles C. Ragland, Scott C. Taylor, Meredith S. White and Christopher Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Wendy Bowman pleaded guilty to receiving stolen property (Pen. Code, § 496, subd. (a); all further statutory references are to this code), identity theft (§ 530.5, subd. (a)), and possession of a fictitious instrument (§ 476) and a blank check (§ 475, subd. (b)) with intent to defraud. Bowman entered her plea after the trial court denied her motion for a hearing to determine whether the police affiant lied or recklessly disregarded the truth in preparing the search warrant affidavit (*Franks v. Delaware* (1978) 438 U.S. 154 (*Franks*) that led to the discovery of contraband in her residence. Bowman's son was the target of the search warrant, but in conducting the search at Bowman's home, the police discovered evidence of her criminal activities. When she entered her guilty plea, Bowman reserved the right to appeal the trial court's *Franks* ruling. Accordingly, she now challenges the trial court's conclusion a factfinding hearing into the affiant's state of mind was unnecessary because probable cause supported the search warrant despite the alleged omissions and a misrepresentation. As we explain, the trial court did not err, and we therefore affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

Based on information that Bowman's son, Devin Bowman,[1] had been involved in a drive-by shooting, police officers executed a search warrant at Bowman's home in early July 2010. Bowman lied to the officers, denying Devin was home, but the police found him on the premises and arrested him and his codefendant. The duo had used Bowman's car in the shooting, and the victim, one of Bowman's three tenants in the home, believed Devin shot him because he owed Bowman $200 in rent. The police also suspected the shooting was gang related. Investigators recovered at Bowman's home the

[1] We refer to Devin by his first name to avoid confusion with his mother, and intend no disrespect.

firearm they believed had been used in the shooting. Bowman denied Devin resided at her home; she told the police he occasionally stayed overnight, but lived primarily with her sister. Devin admitted in his police interview that he stayed at Bowman's house the night before the shooting.

In late October 2010, the police executed another search warrant at Bowman's residence to obtain evidence in Devin's personal effects of his alleged involvement in a white supremacist criminal street gang, including photographs of known gang members, gang-related clothing, gang graffiti or references in any of his writings or electronic correspondence, and other indicia of gang membership. The police also sought information related to the shooting such as witness lists or information pertinent to the victim, and other firearms that may have been used in the shooting. During this search, the police discovered the identity theft and fraudulent check evidence used against Bowman in the present case.

Bowman filed a motion to suppress the evidence based on material omissions and an alleged misrepresentation in the search warrant affidavit. She sought a *Franks* hearing to establish the officer who prepared the warrant intentionally lied or recklessly disregarded the truth. Specifically, she claimed the officer misrepresented that Devin lived at the search address. She pointed to a parole record listing Devin's address on May 17, 2010, as "Transient," but the same parole record listed the search address as Devin's residence three days earlier on May 14, 2010. The parole record noted twice that the residence belonged to Devin's mother.

Bowman acknowledged the October 2010 search affidavit asserted that "[a]ny lapse in time from the date of the incidents to the present . . . will not reduce the likelihood that the evidence and street gang paraphernalia will be found in the locations

sought to be searched," but Bowman complained the affidavit omitted both that Devin had remained in custody since his arrest almost four months earlier in July 2010, and also omitted that other tenants lived in the home. Bowman argued that these omitted facts made it implausible any of the items the police sought still remained at the search address, and had the magistrate been aware of these omissions, the warrant would not have issued because it lacked probable cause. The trial court denied Bowman's motion to traverse the warrant and concluded a *Franks* hearing to explore the police affiant's truthfulness was unnecessary.

The trial court imposed concurrent, two-year midterm sentences on all four counts against Bowman, and specified the term was concurrent to a six-year term imposed in an unrelated case. Bowman now appeals.

II

DISCUSSION

Bowman contends the trial court erred in denying her an evidentiary hearing under *Franks*. (*Franks*, *supra*, 438 U.S. at p. 154-156.) As our high court has explained, *Franks* held a defendant has "[a] limited right to challenge the veracity of statements contained in an affidavit of probable cause made in support of the issuance of a search warrant." (*People v. Panah* (2005) 35 Cal.4th 395, 456.) To gain an evidentiary hearing, the defendant must make a prima facie showing (1) that the affidavit contains deliberately false statements or statements made in reckless disregard for the truth, *and* (2) the affidavit's remaining contents, after the false statements are excised and omissions added, are insufficient to support a finding of probable cause. (*Franks*, at p. 155.) Innocent or negligent misrepresentations do not support a defendant's motion to quash a

warrant; the falsehood must be deliberate or reckless. (*Franks, supra,* 438 U.S. at p. 156.)

Even where the affiant intentionally or recklessly has omitted a material fact, however, the remedy is simply to add the omitted information to the affidavit and test it again for probable cause. (*People v. Mayer* (1987) 188 Cal.App.3d 1101, 1120-1121.) Similarly, the defendant bears the burden to establish that deleting a material misrepresentation from the affidavit eliminates probable cause supporting the search warrant. (*People v. Scott* (2011) 52 Cal.4th 452, 484.) We review de novo a trial court's decision denying a *Franks* evidentiary hearing into the affiant's state of mind. (*People v. Sandlin* (1991) 230 Cal.App.3d 1310, 1316.) Here, we cannot say the alleged omissions or misrepresentation eliminated the requisite probable cause supporting the search warrant; consequently, an evidentiary hearing under *Franks* was unnecessary.

Bowman argues that the police wrongfully obtained the search warrant by misrepresenting that Devin still lived at the search address. But even assuming the affidavit had included the parole information listing Devin as a "Transient," the same parole sheet listed the search address as Bowman's home, identified Bowman as Devin's mother, and noted her residence was Devin's last known abode just three days before he became transient. This information accurately suggested Devin could be found at the search address. Indeed, the success of the earlier search warrant strongly suggested his personal effects and information related to the shooting could be located there, given police found both Devin and the gun at Bowman's home after the shooting.

A magistrate reasonably could conclude on these facts the search warrant should issue, even had the most recent "Transient" notation been included. A warrant does not require certainty; rather, "[p]robable cause is defined as '"'a fair probability that

contraband or evidence of a crime will be found.’”’ [Citations.]” (*People v. Evans* (2011) 200 Cal.App.4th 735.) Correcting the affidavit as Bowman suggests regarding Devin’s recent transiency still meets this standard. There is no reason to consider only the “Transient” notation on Devin’s parole sheet without also including the related information that the search address belonged to Devin’s mother and was his last known residence. To omit this information as Bowman impliedly suggests would itself be a misrepresentation.

Similarly, the probable cause calculus does not change had investigators included other omitted details in the affidavit. The omitted fact that Devin continuously remained in custody between his July arrest and the second search in October, and that other tenants also lived in Bowman’s home, did not mean it was unlikely the police would find Devin’s personal effects or evidence related to the shooting at the search address. That might be true in another context not involving the search target’s mother or where the victim did not also live at the same address. But here a magistrate reasonably could conclude Bowman would preserve Devin’s personal items precisely because of the mother-son relationship.

Bowman misplaces reliance on two Ninth Circuit cases, *U.S. v. Grant* (2012) 682 F.3d 827 (*Grant*) and *Bravo v. City of Santa Maria* (2011) 665 F.3d 1076 (*Bravo*). In *Grant*, no probable cause supported searching a father’s house for evidence his two sons committed a homicide when nothing connected the sons to their father’s home; at most, one son merely had visited the father six months after the shooting. And in *Bravo*, nothing suggested a son’s gang may have stashed a drive-by shooting weapon at the parent’s house, given the son “could not have been involved in the shooting or in concealing the evidence” because he had been incarcerated well before, during, and after

the shooting. (*Bravo*, at p. 1084.) Here in contrast, the warrant still would have issued because there was ample evidence connecting Devin to Bowman's home even correcting for any misrepresentations or omissions in the search affidavit. Consequently, there was no need for a *Franks* evidentiary hearing. The trial court did not err.

III

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

MOORE, ACTING P. J.

THOMPSON, J.